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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ADOLPHUS MORGAN, Plaintiff and Appellant, v. AT&T COMMUNICATIONS OF CALIFORNIA, INC. et al., Defendants and Respondents.	H039904 (Santa Clara County Super. Ct. No. 1-11-CV-215743)

Plaintiff Adolphus Morgan appeals from the summary judgment granted in his disability discrimination and wrongful termination lawsuit. Plaintiff asserts on appeal that a triable issue exists as to whether he named the proper parties as defendants.

In March 2009, plaintiff received a warning letter stating that his Denied Disability Benefits Leave would not be extended beyond March 26, 2009. The letter explained: "In the event that you are unable to return to work or fail to timely return the completed [work capabilities checklist], please be advised that your employment with AT&T California (Pacific Bell Telephone Co.) will be terminated effective March 27, 2009." A termination letter dated March 30, 2009 stated: "Due to the fact that you did not return to work on March 27, 2009, ready, willing and able to perform your job and that the [work capabilities checklist] you submitted on March 17, 2009 indicates you are able to return to work, your employment with AT&T California (Pacific Bell Telephone Company) has been terminated effective March 27, 2009."

Plaintiff filed a complaint against AT&T Communications of California, Inc. and AT&T Corp. alleging disability discrimination and wrongful termination in violation of California's Fair Employment and Housing Act (FEHA) and public policy. He identified AT&T Communications of California, Inc. as a subsidiary of AT&T Corp., and he parenthetically denoted AT&T Communications of California, Inc. as "AT&T California." He alleged that he worked for AT&T California from 1996 until his termination and that "the AT&T Defendants" qualified as his FEHA employer.

Defendants moved for summary judgment or in the alternative summary adjudication on all causes of action, contending, among other things, that neither defendant was plaintiff's employer. The trial court granted that motion because plaintiff failed to establish that he had been employed by either defendant.

On appeal, plaintiff refers to defendants collectively as "AT&T" and contends there is a triable issue about whether AT&T was his employer. After independently reviewing the motions, opposition, and reply, we will conclude that summary judgment should not have been granted, as defendants did not carry their burden of establishing the absence of any triable issue with regard to the identity of plaintiff's employer for FEHA purposes. In addition to the above declarations, defendants produced other documents, including the warning and termination letters, reflecting that plaintiff was employed by "AT&T California (Pacific Bell Telephone Co.)" when he was terminated. While their declarations asserted that Pacific Bell was a separate corporation from either defendant, there was no similar statement about AT&T California nor any explanation of the relationship between AT&T California and either defendant. Their denials of employer status are simply legal conclusions. In light of those triable issues, we will reverse the judgment.

THE COMPLAINT

According to his complaint, plaintiff worked for "AT&T California" from 1996 through March 27, 2009, holding positions of Engineer and Engineering Manager

(par. 9). The complaint alleged that AT&T California is defendant AT&T Communications of California, Inc., which is a subsidiary of defendant AT&T Corp. (par. 2), and that both corporations qualified as plaintiff's FEHA employer (par. 27).

Plaintiff alleged that he suffered from "physical and mental disabilities" caused by his workplace. His employment relationship changed "after he complained to his superiors about changes the Defendants implemented in workplace conditions, policies and procedures." "From October 20, 2007 through January 14, 2008, Plaintiff took a temporary leave of absence from work due to work-related stress, including suffering severe chest pains, shortness of breath, headaches, anxiety, fear, and loss of sleep." When he returned to work, he requested a transfer to a different department and location. Instead, plaintiff was assigned a new supervisor who placed him on a Performance Improvement Plan and continued the same pattern and practice of conduct.

Plaintiff took a second leave of absence in May 2008 and filed a workers' compensation claim. Defendants recognized plaintiff's disability through March 26, 2009. Plaintiff repeatedly requested an accommodation from defendants in the form of a transfer to a different office or department. Plaintiff's treating physician advised defendants that plaintiff "could perform the essential functions of his position" if plaintiff were given a transfer. "On March 27, 2009, Defendants terminated Plaintiff's employment, while he was still suffering from physical and mental disabilities" and while he was on disability leave. Defendants failed "to engage in a timely, good faith, interactive process with an employee to determine an effective and reasonable accommodation," and they refused to accommodate plaintiff's disabilities. "At the time the Defendants retaliated against [plaintiff], he was engaged in a protected activity, to wit he was suffering disabilities and requested an accommodation from the Defendants, which they denied."

Plaintiff alleged the following causes of action based on the above facts: wrongful termination in violation of public policy (first cause of action) and FEHA (second cause

of action); disability discrimination in violation of FEHA (third cause of action) and public policy (fourth cause of action); failure to engage in an interactive process (sixth cause of action) and provide a reasonable accommodation (fifth cause of action) in violation of FEHA; and retaliation in violation of FEHA (seventh cause of action) and public policy (eighth cause of action).

DEFENDANT'S MOTION

Defendants moved for summary judgment or summary adjudication of all issues, including the identity of plaintiff's employer. In support of summary judgment, defendants filed a separate statement listing 53 material and undisputed facts. In support of the request for summary adjudication of 11 issues,[1] defendants filed a second statement identifying 483 facts as material and undisputed.[2]

In reviewing the motion, we have attempted to focus on the facts relevant to identifying plaintiff's employer. The first summary judgment fact was that plaintiff "applied for and was hired as a Communications Technician by Pacific Bell Telephone Company ('Pacific Bell') in July 1996, and understood he was working for Pacific Bell." To establish that fact, defendants cited an excerpt from plaintiff's deposition discussing his employment application which showed a "Pacific Bell" logo above the words "A Pacific Telesis Company." Plaintiff understood that he would be working for Pacific Bell.

[1] The 11 issues were the absence of triable issues as to each of the eight causes of action (issues three through ten) and as to a claim for punitive damages (issue 11), and that neither AT&T Communications of California, Inc. (issue one) nor AT&T Corp. (issue two) was ever plaintiff's employer.

[2] We will use "summary judgment fact" to refer to separately stated facts in support of summary judgment and "summary adjudication fact" to refer to separately stated facts supporting summary adjudication.

The 51st summary judgment fact was that plaintiff was employed by Pacific Bell and he received W-2 forms identifying Pacific Bell Telephone Company as his employer.[3] To establish that fact, defendants referred again to the excerpt from plaintiff's deposition that supported the first fact and also referred to a deposition excerpt in which plaintiff identified the W-2 forms he received that named "Pacific Bell Telephone Company" as his employer in 2005, 2006, 2007, 2008, and 2009. The company listed its Saint Louis, Missouri street address in 2005 as "One SBC Ctr, 28-T-08" and in 2006 as "One AT&T Ctr, 28-K-07." In 2007, the address changed to Chestnut Street.

In part of the cited deposition excerpt, plaintiff was asked, "Did you ever believe that you worked for anyone else other than Pacific Bell Telephone Company?" He answered, "At the time I left AT&T, they wasn't sure who was really in charge of the company. It was a longstanding joke between people who work there. We started out at SBC, went to AT&T. It was all right. So we all missed – all depends who you talk to on what day."

In further support of Pacific Bell being the employer, defendants cited a deposition excerpt discussing a self-nomination form completed by plaintiff. Plaintiff recalled printing that form in 2007 to show his manager available positions to which he could transfer. The form is from "myintranet.att.com" with an AT&T logo and a description of "AT&T Career Path Opportunity Details." The opportunity listed a position with "Company: Pacific Bell Telephone."

The 52d summary judgment fact was that AT&T Corp. and AT&T Communications of California, Inc. are separate entities from Pacific Bell Telephone Company and neither was the parent of that company. The 53d summary judgment fact

[3] This fact was restated as summary adjudication fact 1, 4, 110, 163, 216, 269, 322, and 428.

was that neither AT&T Corp. nor AT&T Communications of California, Inc. ever employed plaintiff and neither played a role in any employment decisions affecting him.

The 52d and 53d summary judgment facts are predicated on declarations by two officers of AT&T Corp.[4] Paula Phillips, a legal administrator for AT&T Corp., declared in February 2013: (1) AT&T Corp. is a separate corporate entity from Pacific Bell Telephone Company; (2) it was never the parent entity of Pacific Bell; (3) it never employed plaintiff; and (4) it "played no role in any employment decisions regarding" plaintiff. James Dionne, an accounting executive director for AT&T Corp. and former chief financial officer of AT&T Communications of California, Inc., made virtually the same four statements about AT&T Communications of California, Inc. He also stated that AT&T Communications of California, Inc. merged into AT&T Corp. in October 2012. In other words, AT&T Corp. is a successor of AT&T Communications of California, Inc., according to its former chief financial officer.

Our review of defendants' motions does not stop with the few facts they consider relevant to identifying plaintiff's employer. We find other relevant documents presented by defendants to establish that plaintiff's job performance was unsatisfactory, and that plaintiff was terminated for failing to return to work after a nine-month discretionary leave even though his physician had certified he had no work restrictions.

To establish the reason for plaintiff's termination, one "fact" was that Antoinette Carter of the Employee Relations Department treated plaintiff "in accordance with Pacific Bell's DDBL [Denial of Disability Benefits Leave] policy and recommended termination of [plaintiff's] employment as a result." (Summary judgment fact 45; summary adjudication facts 51, 104, 157, 210, 263, 316, 369, 422, and 475.) That fact

[4] Those facts are restated as summary adjudication facts 2, 3, 5, 6, 58, 59, 111, 112, 164, 165, 217, 218, 270, 271, 323, 324, 376, 377, 429, and 430.

was predicated entirely on Carter's declaration, in which she stated that she began the termination process because plaintiff appeared able, but unwilling, to return to work: "I made the determination that Mr. Morgan had no restrictions that prevented him from performing the essential functions of his job as a Hi-Cap work engineer and recommended his termination to his Department. … The decision to discontinue his leave under the DDBL program and proceed with termination was made in accordance with the DDBL policy." It is notable that Carter, unlike defendants' counsel, did not describe the program or policy as Pacific Bell's program or policy.

More significant are the letters to plaintiff on AT&T letterhead leading up to and announcing plaintiff's termination. A letter from Carter dated July 15, 2008 granted plaintiff DDBL from June 9 through August 6, 2008 because plaintiff had not returned to work and his doctor considered him disabled. (Exh. A to Carter declaration.) Subsequent letters from Carter dated August 28, October 7, and December 10, 2008 granted DDBL extensions because plaintiff's doctor stated he was disabled. (Exhs. D, E, and F to Carter declaration.) Each letter informed plaintiff of his "current employment status with AT&T California (Pacific Bell Telephone Company)."

Carter also sent plaintiff the March 13, 2009 warning letter, and she was copied on the March 30, 2009 termination letter signed by the Director of Construction and Engineering. Enclosed with the termination letter was a "NOTICE TO CALIFORNIA REGION EMPLOYEE AS TO CHANGE IN RELATIONSHIP" that stated, "Your employment with AT&T California (Pacific Bell Telephone Company) is terminated on March 27, 2009." (Exh. 39 to plaintiff's deposition.) Also enclosed was a final paycheck from AT&T bearing its logo. (Exh. 39 to plaintiff's deposition.)

While all six letters were attached to Carter's declaration, only the warning and termination letters were referenced in the statements of facts in support of the dispositive motion. (Warning letter in summary judgment facts 40 and 41 and summary adjudication facts 46, 47, 99, 100, 152, 153, 205, 206, 258, 259, 311, 312, 364, 365, 417, 418, 470,

471; termination letter in summary judgment fact 46 and in summary adjudication facts 52, 105, 158, 211, 264, 317, and 423 Though the factual statements by defendants did not mention the repeated references to "AT&T California (Pacific Bell Telephone Co.)" as plaintiff's employer, we nevertheless consider them material to the issue of who employed plaintiff.[5]

Also relevant are performance reviews of plaintiff. To establish plaintiff's poor performance, defendants relied on declarations by plaintiff's supervisors, Maria Pallares from September 2006 through February 2008, and Keith Parks thereafter, and documents attached to those declarations. Pallares completed a form evaluation of plaintiff's performance for 2006. (Exh. B to Pallares' declaration; summary judgment fact 8; summary adjudication facts 14, 67, 120, 173, 226, 279, 332, and 438.) The form was titled "AT&T Inc.: AT&T West – 2006 Performance Year." It discussed aligning employee goals "with the AT&T Vision, Mission, Strategies, and Values." It listed goals of "AT&T West" and "AT&T West Network Services," "SBC West – South Bay Construction & Engineering Region 2006" was shown as a "Department."

In March 2008, Parks put plaintiff on a 60-day Pre-Performance Improvement Plan (Pre-PIP). (Summary Judgment fact 28; summary adjudication facts 34, 87, 140,

[5] The documents were featured in plaintiff's opposition, as will we explain. Some opinions have applied a so-called "Golden Rule" of summary adjudication that a fact "does not exist" unless it appears in a separate statement. (E.g., *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 [superseded by statute on another point as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4]; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 640.) However, other opinions have recognized that a moving or opposing party cannot make a fact in the supporting documents disappear by ignoring or mischaracterizing it in a separate statement. (Cf. *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 438 ["The separate statement is not designed to pervert the truth, but merely to expedite and clarify the germane facts."].)

193, 246, 299, 352, 405, and 458.) Two months later Parks told plaintiff he was going to be placed on a Performance Improvement Plan and given 30 days to improve or be terminated. (Summary judgment fact 31; summary adjudication facts 37, 90, 143, 196, 249, 302, 355, 408, and 461.) Attached to the declaration by Parks were four- and five-page "AT&T Pre-Improvement Performance Plans" (Exh. D) and a six-page "AT&T Performance Improvement Plan" (Exh. E). Those plans were incorporated by reference into plaintiff's 2008 performance review, which was also attached to Parks' declaration (Ex. F). The review, on a form entitled "AT&T Achievement and Development (2008)" with an AT&T logo, was not mentioned in defendants' separate statements of facts.

PLAINTIFF'S OPPOSITION

Plaintiff disputed most of the contentions about his employer's identity by pointing out that he received several documents while employed naming "AT&T California" as his employer. In response to defendants' statement of undisputed facts, plaintiff did not dispute that he was initially hired by Pacific Bell, but asserted that he worked for SBC and AT&T as well.

Plaintiff attached 41 documents to his opposition, declaring that each exhibit was a true and correct copy of a document he received from defendants or their attorneys in the course of his employment with Pacific Bell, SBC, and AT&T. He also declared that he was hired by Pacific Bell, which was purchased by SBC, which in turn was purchased by AT&T. He believed that Pacific Bell operated in California as AT&T Communications of California, Inc., a subsidiary of AT&T Corp.

Included in the 41 documents were eight we have summarized above because they were associated with defendants' moving papers: the four letters from Antoinette Carter dated July 15 (Exh. 20), August 28 (Exh. 22), October 7 (Exh. 23), December 10, 2008 (Exh. 24); the March 13, 2009 warning letter explaining the status of his employment with "AT&T California (Pacific Bell Telephone Co.)" (Ex. 25), the March 30, 2009 termination letter reporting the termination of his employment by "AT&T California

(Pacific Bell Telephone Company)" (Ex. 26); and the 2006 (Exh. 9) and 2008 (Exh. 13) performance reviews.

Plaintiff also relied on other performance reviews on forms provided by various entities. In 2003 and 2004, the reviews were on forms from "SBC COMMUNICATIONS INC. AND ITS BUSINESS UNITS" with an SBC logo. (Exhs. 4, 5.) A 2005 review was captioned "SBC COMMUNICATIONS INC. - SBC West NETWORK SERVICES" with the SBC logo (Exh. 6).

Plaintiff received an April 10, 2006 written inquiry from an "AT&T California" area manager asking for plaintiff's first quarter accomplishments. (Exh. 8.) Seven pages of a 2006 performance review were captioned "AT&T – Network Services, West," and other pages of that review were captioned "AT&T Network Services (C&E)," "AT&T – West NETWORK SERVICES," and "AT&T Inc.: AT&T West – 2006 Performance Year." That review included recitals of "AT&T West Goals," and "AT&T West Network Services Goals," and identified "SBC West – South Bay Construction & Engineering Region 2006" as a "Department." (Exh. 7.)

In July 2007, plaintiff acknowledged in writing that he had read and reviewed the "AT&T Customer Privacy Course." (Exh. 11.) In February 2008, plaintiff acknowledged completing "the Protecting Information at AT&T Training … ." (Ex. 12.)

In June 2008, plaintiff filed a workers' compensation claim asserting workplace injuries including headaches, dizziness, chest pains, anxiety, anger, and depression suffered on May 30, 2008. (Exh. 15.) The area manager who completed the "Employer" section of the claim form identified "AT&T" as plaintiff's employer. Correspondence regarding that claim was from the "AT&T Integrated Disability Service Center." (Exhs. 14, 18.) A letter dated June 24, 2008 explained that plaintiff might be entitled to benefits under either "the Pacific Telesis Group Comprehensive Disability Benefits Plan or the AT&T Disability Income Plan." (Exh. 18.) The "AT&T Integrated Disability Service Center" denied plaintiff's claim on July 3, 2008. (Exh. 19.)

Plaintiff also supported his opposition with Internet research showing that "Pacific Bell is doing business in California as 'AT&T California.'" Specifically, plaintiff provided a Wikipedia entry for Pacific Bell that explained how SBC Communications acquired Pacific Telesis Group in 1997 and rebranded the company as SBC Pacific Bell and later as SBC. According to the article, SBC acquired AT&T Corp. in 2005 and formed AT&T Inc., and "Pacific Bell is now known as " 'Pacific Bell Telephone Company, d/b/a AT&T California.' " That company's direct parent became AT&T Teleholdings, and its former direct parent, Pacific Telesis Group was merged into AT&T Teleholdings. (Exh. 41.)

DEFENDANTS' REPLY

Defendants asserted that plaintiff had failed to present admissible evidence raising a triable issue that either was his employer. There was no evidence that either defendant was a joint employer with a right to control plaintiff's work performance.

Defendants lodged 17 objections to plaintiff's opposition documents. They objected that Exhibits 7 through 40 were irrelevant, unauthenticated, inadmissible hearsay and did not reflect the personal knowledge of plaintiff or his counsel. One objection was that plaintiff has no personal knowledge of receiving documents addressed to him during his employment. Defendants also objected to plaintiff's reliance on the eight documents we noted that they themselves offered in support of their dispositive motion.

TRIAL COURT'S RULING

In granting defendants' motion, the court relied on plaintiff's W-2 statements from 2005 to 2009 listing "Pacific Bell Telephone Company" as his employer, and on declarations from AT&T Corp. executives stating that neither defendant had employed plaintiff and neither was involved in any employment decisions regarding plaintiff. In the trial court's view, the March 2009 letters showed Pacific Bell doing business as AT&T California. The trial court observed that the use of a fictitious business name does

not create a separate legal entity, and that plaintiff had not named "AT&T California" as a defendant. The court concluded that even if plaintiff had produced evidence that defendants were Pacific Bell's parent company, plaintiff failed to produce evidence that defendants had sufficient control over the subsidiary to justify piercing the corporate veil.

DISCUSSION

STANDARD OF REVIEW

"A defendant seeking summary judgment 'has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' ([Code Civ. Proc.,]§ 437c, subd. (p)(2).) A summary judgment 'shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court ... .' (§ 437c, subd. (c).) [¶] Because entitlement to a summary judgment presents questions of law, on appeal we independently review all the evidence set forth in the motion and opposition except that to which an objection was expressly sustained." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1522–1523.)

An opponent has no burden to produce any evidence until the moving party has produced evidence sufficient to establish there is no triable issue as to a defense or the nonexistence of an element of the plaintiff's cause of action. (Cf. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "Where the evidence presented by defendant does not support judgment in his favor, the motion must be denied without looking at the

opposing evidence, if any, submitted by plaintiff." (*Duckett v. Pistoresi Ambulance Service, Inc.* (1993) 19 Cal.App.4th 1525, 1533; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

EMPLOYER STATUS UNDER FEHA

California's Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.) imposes statutory restrictions on discrimination by public and private employers with more than four employees, and it has created statutory rights of action for violation of those restrictions.[6] FEHA recognizes as a civil right the right "to seek, obtain, and hold employment without discrimination because of" various characteristics, including physical or mental disability. (§ 12921.) An employee cannot be discharged for developing a physical or mental disability unless "the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations." (§ 12940, subd. (a)(1).) It is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition" (*id.* at subd. (n)), "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" (*id.* at subd. (m)), or "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part …" (*id.* at subd. (h)).

[6] Unspecified section references are to the Government Code.

After the filing of respondents' brief, the California Supreme Court observed: "There are few California cases defining an 'employer' under the FEHA provisions invoked here. But, it appears, traditional common law principles of agency and respondeat superior supply the proper analytical framework under FEHA, as they do for franchising generally. Courts in FEHA cases have emphasized 'the control exercised by the employer over the employee's performance of employment duties.' (*Bradley v. Department of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1612, 1626 [(*Bradley*)], citing *Vernon*[*v. State of California* (2004)] 116 Cal.App.4th 114, 124–125 [(*Vernon*)]; accord, *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 301–302.) This standard requires 'a comprehensive and immediate level of "day-to-day" authority' over matters such as hiring, firing, direction, supervision, and discipline of the employee. (*Vernon, supra,* 116 Cal.App.4th at pp. 127–128.)" (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 499 (*Patterson*).)

At issue in *Patterson* was whether a franchisor qualified as an employer liable for sexual harassment of a subordinate by a supervisor employed by a franchisee. (*Patterson*, *supra*, 60 Cal.4th at p. 477.) The Supreme Court scrutinized the contract provisions establishing the franchisor-franchisee relationship and noted that the franchisee was solely responsible for managing its employees. (*Id.* at pp. 500–501.) The court also considered how closely actual practices reflected the contract model. (*Id.* at pp. 501–502.) The franchisee hired new employees who were exposed to orientation materials provided by the franchisor. (*Id.* at p. 501.) However, with regard to sexual harassment training, the franchisee was in control and the franchisor had no mechanism for monitoring sexual harassment complaints. (*Id.* at pp. 502–503.)

The court concluded that a franchisor "becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." (*Patterson*, *supra*,

60 Cal.4th at pp. 497–498.) The court upheld the grant of a summary judgment in favor of the franchisor because "[n]o reasonable inference can be drawn that Domino's, through Lee, retained or assumed the traditional right of general control an 'employer' or 'principal' has over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. Hence, there is no basis on which to find a triable issue of fact that an employment or agency relationship existed … ." (*Id.* at p. 503.)

Patterson identified *Vernon* as a leading case identifying the characteristics of an employer for FEHA purposes. In that case the issue was whether the State of California was a joint employer of a firefighter employed by the City of Berkeley. (*Vernon*, *supra*, 116 Cal.App.4th at p. 118.) The firefighter argued that because "the State has 'thoroughly dictated the City's employment policies' through the adoption of mandatory employment regulations and the refusal to grant an exemption to his direct employer, liability for the discriminatory effect of the CAL-OSHA regulations may be imposed upon the State as an indirect or joint employer under section 12940, subdivisions (a) and (d) even without a 'direct employment relationship.'" (*Id.* at p. 120.) The appellate court concluded that "the State does not fall within the scope of the definition under any recognized test or standards." (*Id.* at p. 124.)

Vernon listed a number of circumstances potentially relevant to identifying a person's employer, including "payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the

skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment." (*Vernon, supra,* 116 Cal.App.4th at p. 125.) "'Of these factors, the extent of the defendant's right to control the means and manner of the workers' performance is the most important.'" (*Id.* at p. 126.)

In reviewing indicia of an employment relationship, *Vernon* did not mention section 12928, effective in 2000, which provides: "Notwithstanding any other provision of this part, there is a rebuttable presumption that 'employer,' as defined by subdivision (d) of Section 12926, includes any person or entity identified as the employer on the employee's Federal Form W-2 (Wage and Tax Statement)." (§ 12928.) That section, along with an amendment to section 12960, was intended to facilitate an employee's identification of his or her FEHA employer, "'for example, where there are parent and subsidiary corporations with similar names, but the employee is unaware of any distinction between the two entities. Very often these distinct entities are housed in the same facility which further complicate[s] identification of the proper party to be named.'" (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 211 (1999-2000 Reg. Sess.) as amended Sept. 1, 1999, p. 4.)

Vernon twice cited *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727 (*Laird*) (implicitly disapproved on another ground by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524). At issue in *Laird* was whether a parent corporation was liable for alleged discrimination by its subsidiary. The *Laird* court noted: "An employee who seeks to hold a parent corporation liable for the acts or omissions of its subsidiary on the theory that the two corporate entities constitute a single employer has a heavy burden to meet under both California and federal law. Corporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result." (*Laird*, at p. 737.)

Laird borrowed the "'integrated enterprise'" test from federal civil rights decisions to "determine whether two corporations should be considered a single

employer[.]" (*Ibid.*) The test has four factors: "interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control." (*Ibid.*) The *Laird* court explained: "Although courts consider the four factors together, they often deem centralized control of labor relations the most important. [Citation.] 'The critical question is, "[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination?" [Citation.] A parent's broad general policy statements regarding employment matters are not enough to satisfy this prong. [Citation.] To satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary.' " (*Id.* at p. 738.)

APPLICATION TO PLAINTIFF'S CLAIMS

Plaintiff's complaint alleged that defendant AT&T Communications of California, Inc. was a subsidiary of defendant AT&T Corp. Plaintiff referred to AT&T Communications, Inc. of California as AT&T California, and he alleged that both AT&T corporations qualified as his FEHA employer. The trial court concluded that defendants met "their initial burden of establishing they were not Plaintiff's employer" and thereby shifted the burden to plaintiff to establish a triable issue. But we determine that several documents presented by defendants indicate the existence of a triable issue as to plaintiff's employer for FEHA purposes.

Defendants claimed it was undisputed that plaintiff's employer was Pacific Bell Telephone Company (Pacific Bell), based on W-2 forms from 2005 through 2009. Those forms indeed give rise to a rebuttable presumption that Pacific Bell was an employer. (§ 12928.) But the statutory presumption does not go so far as to preclude the possibility of other employers.

Documents offered by defendants to establish other undisputed facts tend to rebut the presumption arising from the W-2s by establishing that plaintiff's employer was "AT&T California (Pacific Bell Telephone Company)." To demonstrate that plaintiff's termination was justified, defendants relied on a series of letters from Antoinette Carter

from July 15, 2008 through March 13, 2009 explaining plaintiff's "current employment status with AT&T California (Pacific Bell Telephone Company)." Carter's last letter warned plaintiff that his "employment with AT&T California (Pacific Bell Telephone Co.) will be terminated" unless he returned to work immediately. Finally, plaintiff was notified by the March 30, 2009 termination letter that his "employment with AT&T California (Pacific Bell Telephone Company) has been terminated[.]" Defendants concede in their brief that "[a]ll of Carter's letters regarding [plaintiff's] DDBL identify 'AT&T California (Pacific Bell Telephone Co.)' as his employer." Those letters indicate some kind of relationship between Pacific Bell and "AT&T California" without elaborating on the nature of the relationship.

Defendants produced declarations from two officers of AT&T Corp. asserting that Pacific Bell was a different corporation than either AT&T Corp. or AT&T Communications of California, Inc., and denying that either corporation was the parent of Pacific Bell. But those declarations did not explain the relationship between defendants and AT&T California, and they did not deny that AT&T Communications of California, Inc. was known as "AT&T California." Indeed, there was no attempt in defendants' motions to explain the nature of AT&T California.

Attempting to demonstrate plaintiff's poor work performance, defendants relied on a 2006 performance review captioned "AT&T Inc. AT&T West – 2006 Performance Year," and listing "SBC West – South Bay Construction & Engineering Region 2006" as the relevant department. Defendants also relied on a 2008 performance review headed with the AT&T logo and entitled "AT&T ACHIEVEMENT AND DEVELOPMENT (2008) Goals Achievement and Appraisal." That document incorporated by reference an "AT&T Pre-Improvement Performance Plan" and an "AT&T Performance Improvement Plan."

As plaintiff points out, the name "Pacific Bell" does not appear in either performance review. Defendants retort that the reviews do not name either defendant.

That assertion begs the question. While the declarations denied identity between Pacific Bell and either defendant, they did not deny identity between the defendants and "AT&T," "AT&T Inc.," "AT&T West," or "AT&T West Network Services." The declarations included no explanation of which manifestation of AT&T was reviewing plaintiff's performance in 2008, what the relationships were in 2006 between AT&T Inc., AT&T West, AT&T West Network Services, SBC West, and plaintiff, or why plaintiff's work performance for Pacific Bell was reviewed on AT&T forms that made no reference to Pacific Bell.

The declarations by AT&T Corp. officers included statements that neither defendant corporation employed plaintiff. As we have seen from the decisions discussed above, who qualifies as an employer under FEHA is a legal conclusion based on a variety of factors. The declarations did not discuss any of the factors pertinent to that legal conclusion apart from a conclusory denial of involvement in employment decisions regarding plaintiff. They did not deny that either corporation established the Denied Disability Benefits Leave program pursuant to which plaintiff was purportedly terminated. They did not deny that plaintiff's work performance was reviewed against standards established by either defendant. Legal conclusions about the application of FEHA in a declaration by a person who is not a legal expert are inadequate to support summary judgment. (Cf. *Neary v. Regents of University of California* (1986) 185 Cal.App.3d 1136, 1143; *Koret of Cal., Inc. v. City etc. of San Francisco* (1969) 2 Cal.App.3d 87, 91.)

In short, to establish as undisputed that neither defendant employed plaintiff for FEHA purposes, defendants directed the trial court's attention to a small portion of the evidence they produced in support of their dispositive motion. However, other evidence they produced reveals unresolved questions about who employed plaintiff when he was terminated. Plaintiff alleged he was employed by AT&T California which he equated with AT&T Communications of California, Inc. A series of letters leading up to his

termination named his employer as "AT&T California (Pacific Bell Telephone Company)." Corporate officers for AT&T Corp. asserted that Pacific Bell was not AT&T Corp. or AT&T Communications, but made no comment about the nature of AT&T California and did not deny that AT&T California was another name for AT&T Communications. We conclude that neither defendant carried its burden of establishing that it does not qualify as plaintiff's employer for FEHA purposes. There remain triable issues about the nature of AT&T California and its relationships with Pacific Bell and the two defendants, AT&T Corp. and AT&T Communications of California, Inc.

In reversing summary judgment, we are not concluding that either defendant was plaintiff's employer for FEHA purposes. It may yet prove to be the case that plaintiff has failed to name the proper corporate entity as his employer. It is enough for us to conclude that there remain triable issues about who employed plaintiff based on conflicting indications and incomplete explanations in the documents on which the moving parties relied.

Defendants' alternative motion for summary adjudication remains outstanding. Our disposition as to defendants' summary judgment motion necessarily resolves the first and second issues presented in that motion—whether either defendant was ever plaintiff's employer—in plaintiff's favor. On remand, the trial court must deny defendants' summary adjudication motion as to those issues, and consider the remaining issues presented in that motion. (*Greystone v. Midtec* (2008) 168 Cal.App.4th 1194, 1225, 1232.)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to deny defendants' motion for summary judgment, to deny defendants' motion for summary adjudication as to issues one and two (regarding whether defendants were plaintiff's employer), and to consider the remaining issues (3 through 11) in defendants' motion for summary adjudication.

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Grover, J.

I CONCUR:

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Bamattre-Manoukian, Acting P.J.

I CONCUR IN THE JUDGMENT ONLY:

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Mihara, J.